Supreme Court, U. S.
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No. 79-1183

In the

Supreme Court of the United States

SIMA PRODUCTS CORPORATION, an Illinois Corporation, and IRWIN DIAMOND,

Plaintiffs-Appellants,

vs.

DR. JOHN McLUCAS, Administrator, FEDERAL AVIATION ADMINISTRATION,

Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI

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NOW COME the Appellants and petition the United States Supreme Court to issue a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, Luther Swygert, Circuit Judge, Case No. 78-2500, as yet unreported. A copy of such opinion is attached hereto and made a part hereof (App. 1a) which was an affirmance of a decision of the United States District Court for the Northern District of Illinois, Eastern Division, Case Number 77 C-81, 460 F. Supp. 128, 1979 Abraham L. Marovitz, Judge, a copy of which opinion is attached hereto. (App. 12a).

I.

THE JURISDICTION OF THIS COURT IS INVOKED FOR THE FOLLOWING REASONS:

1. That judgment was entered by the United States Circuit Court of Appeals for the Seventh Circuit on January 3, 1980 affirming a decision of the United States District Court for the Northern District of Illinois, Eastern Division:

2. That no rehearing was sought;

3. That this Court has jurisdiction to review the judgment in question pursuant to Title 28, United States Code Section 1254(3).

II.

THERE ARE TWO QUESTIONS PRESENTED FOR REVIEW HEREIN AND THEY ARE:

1. Whether or not the promulgation of Rule 121.538 (a) by the Federal Aviation Administration was an Order as defined by 49USC, Section 1486 and as such was subject to the exclusive review of the Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia; and

2. Whether or not the record compiled by the Federal Aviation Administration ~~and~~ promulgating Rule 121.538a (e) was sufficiently complete and adequate to safeguard Constitutional guarantees and be reviewed by a court of appeals without the necessity of an evidentiary hearing at the United States District Court level.

III.

The case involves interpretation of Title 49USC, Section 1486, which provides as follows:

> "Judicial review of orders. —(a) Orders of Board and Administrator subject to review. —Any order, affirmative or negative, issued by the board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act [§1461 of this title], shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore;
>
> "(b) Venue—A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of appeals for the District of Columbia . . ."

and, 14 CFR, Section 121.538a(e) which provides as follows:

> "No certificate holder may use an X-ray system to inspect carry-on baggage or items, unless a sign is posted in a conspicuous place which notifies passengers that such items are being inspected by an X-ray system and advises them to remove all X-ray and scientific film from their carry-on baggage and items before inspection. If the X-ray system ex-

poses any carry-on baggage or item to more than one milliroentgen during the inspection, the certificate holder shall post a sign which advises passengers to remove film of all kinds from their carry-on baggage and items before inspection. If requested by a passenger, his photographic equipment and film packages shall be physically inspected without exposure to an X-ray system."

IV.

The rule above-stated was promulgated by the Federal Aviation Administration of March 5, 1975. Due and proper notice appeared in the Federal Register. In response to the notice the FAA received numerous written comments including a single letter from the plaintiff-appellant, SIMA PRODUCTS CORPORATION and its President, the plaintiff-appellant, IRWIN DIAMOND. Subsequent to receipt of this data, the FAA, without a hearing at which witnesses were called or cross-examined, promulgated the above rule. This rule lead to the posting of signs at O'Hare International Airport and every other commercial airport in the United States which is some fashion recite that "...carry-on baggage is being inspected by X-ray. Inspection will not affect ordinary undeveloped film..."

On August 31, 1976, the plaintiffs filed a Petition with the FAA requesting an amendment to said rule advising passengers to remove film from their carry-on baggage and deleting any reference to the safety of x-rays for ordinary undeveloped film.

After the agency failed to seasonably act, the plaintiffs filed this lawsuit in the United States District Court for the Northern District of Illinois, Eastern Division, in January, 1977. After substantial discovery and after the

case had reached the pretrial stage, the government filed a Motion to Dismiss for lack of subject matter jurisdiction. The government's position was that Title 49USC, Section 1486 conferred exclusive jurisdiction for review of agency "orders" upon Circuit Court of Appeals. The Motion was briefed and a written opinion was rendered by District Judge Abraham L. Marovitz agreeing with the defendant's position and dismissing the lawsuit.

An appeal was taken seasonably by the plaintiffs to the Seventh Circuit Court of Appeals. Briefs were filed and oral arguments had and the Circuit Court of Appeals, Judge Luther Swygert, affirmed the decision of the District Court on January 3, 1980.

This Petition for the issuance of a Writ of Certiorari was then promptly filed.

V.

The jurisdiction of the District Court was invoked under Title 28, Section 1346(a)(2) which provides that claims against the executive branch of the United States of America interpreting acts of Congress or regulations passed by the executive branch must be brought in the United States District Court. Jurisdiction further existed under Title 28, Section 2201 which provides for the awarding of declaratory relief. Prayer for relief included a request that an order issue "declaring that Rule 121.538a(e) of Title 14 of the Code of Federal Regulations is void as unreasonable, arbitrary and capricious, or, in the alternative, is void as being contrary to Title 49, Section 1357, or in the alternative, is void as against public policy. Further, the plaintiff sought an order on the defendant to force it to promulgate an amendment to the aforesaid.

VI.
ARGUMENT

A.

It is imperative that the United States Supreme Court issue a Writ of Certiorari and hear argument in this case since there has been a substantial divergence of opinion as to which types of decisions by administrative agencies are directly reviewable under Section 1486 and which are not. There has been a substantial conflict on this issue as can be evidenced from the opinion of the Circuit Court of Appeals. (App. 1a) The court in its Opinion noted that that District of Columbia Circuit Court had construed the word "order" in an expansive fashion yet the United States Circuit Court of Appeals for the Third Circuit had taken a narrower view in *PBW Stock Exchange, Inc.* v. *SEC,* 485 F2nd 718 (3rd Circuit 1973), Cert. denied, 416 US 969 (1974).

Additionally, the decision of the Seventh Circuit Court of Appeals further clouds the applicability of the "grandfather" of agency review decisions, *United Gas Pipe Line Company* v. *Federal Power Commission,* 181 F2nd 796 (D.C. Circuit) Cert. denied, 340 US 827 (1950). The Court's opinion further cites the case of *Investment Company Institute* v. *Board of Governors of Federal Reserve System,* 551 F2nd 1270 (D.C. Circuit 1977) as overruling the United Gas Pipe Line case. This places a line of cases in direct contradiction with the *PBW Stock Exchange* case, *supra.*

In the brief before the Court of Appeals it was pointed out that the definition of a rule (or a regulation) and an order were, in fact, different and the *PBW Stock Exchange* case was cited therefor. Consequently, it is obvious that a conflict exists between the Investment Company Institute case and its progeny as decided by the District of Columbia Court of Appeals and the *PBW* case as decided by the Third Circuit Court of Appeals.

With the Third Circuit Court of Appeals using one set of criteria to determine what agency edicts are within the ambit of Section 1486 and the District of Columbia Court of Appeals using another in *Investment Company* what is a litigant (or its attorney) to do? The cause of action for one frustrated by the administrative agency in further complicated by subparagraphs (g) of Section 1486 which creates a jurisdictional choice between the Circuit Court of Appeals in his residence or business area and the District of Columbia Court of Appeals. A litigant could file a direct appeal in the District of Columbia Court of appeals and an original complaint in the District Court of his residence and successfully obtain two "bites at the apple", or none!

The issue is further clouded by *Nader* v. *FAA* 440 F2d 292 (1971) where neither the District Court for the District of Columbia or the Court of Appeals for the District of Columbia addressed the jurisdictional issue. The courts simply proceeded to the merits of the cause and allowed the District Court to uphold the agency.

Further that same District Court assumed the jurisdictional issue in favor of the plaintiff, or this same agency chose to be reversed rather than raise the jurisdictional question, in *Nadar* v. *Butterfield* 373 F Supp. 1175. (Interestingly this case involved the exact rule 121.538(a) and led to its modification to its current status.)

If the District of Columbia Courts are in conflict with themselves and the Third Circuit, how can the Supreme Court not intercede?

It is well settled that certiorari will be granted where there is a clash of opinions of different Circuits. *Universal Camera Corp.* v. *NLRB* (1951) 340 US 474, 95 L Ed. 456, 71 S Ct 456, *NLRB* v. *Pittsburgh S. S. Co.* (1951) 34 US 498, 95 L Ed. 479, 71 S Ct. 453, *Commissioner* v. *Bilder* (1962) 369 US 499, 8 L Ed. 2d 65, 82 S Ct. 881.

B.

The issue of the proper forum for review of decisions of administrative agencies is certainly one of vital importance. Each day more and more decisions are made for the citizens of the United States by administrative agencies. Congress and the courts have been careful to safeguard the rights of citizens by allowing for proper review of these edicts. At the present time it is unclear as to which approach a disappointed litigant, or collaterally affected person or entity, should take when faced with an administrative agency's ruling, regulation, or order which in their view is wrong or unpleasant or otherwise fit to be challenged.

Section 1486 further creates a fatal penalty for one who chooses the wrong forum. Since there are only sixty days allowed within which to file for review of an agency order, absent good cause shown, it is not inconceivable that a litigant could choose the improper forum and thus be barred from a review. It is clearly not the desire of any executive agency, the Congress, or the courts to foreclose review. Although the Statute seemingly guarantees review, the multitude of cases and confusion over the judicial interpretation of the Statute have eroded that promise. Consequently, it is essential that the United States Supreme Court hear the instant case and clarify from this day forward the word "order" and set forth the facts under which the Court of Appeals will be the exclusive reviewing court for administrative agency action.

To date this court has not ruled on this issue at any time. Several of the cases cited in the Circuit Court of Appeals' decision indicate that certiorari has been denied in those cases in the past.

The issue in this case goes beyond the parties to this suit. The action of the FAA affects every air line traveler in the country. There is no need to burden the court with figures of travelers through US airports; suffice it to say that the figure is in the millions. Each of them is bound by the agency decision challenged herein. This alone compels the granting of the writ for the writ is to be granted when the questions presented are sufficiently important and grave, *NLRB* v. *Pittsburgh,* supra.

There is more involved in this jurisdictional issue than the plaintiff, the FAA and its decision which is the subject matter of the litigation. One could compile a book of cases dismissed because the litigant before the agency chose the wrong forum to seek reversal of the administrative decision. Almost every case cited by the Court of Appeals and the parties in their briefs were ones where the review was sought in the wrong forum, be it District Court or Court of Appeals, *City of Rochester* v. *Bond,* 603 F.2d 927, 936 (D.C. Cir. 1979); *Investment Company Institute* v. *Board of Governors of Federal Reserve System,* 551 F.2d 1270 (D.C. Cir. 1977); *Deutsche Lufthansa Aktiengesellschaft* v. *C.A.B.,* 479 F.2d 912

(D.C. Cir. 1973); *PBW Stock Exchange Inc.* v. *SEC,* 485 F.2d 718 (3rd Cir. 1973) cert. denied, 416 U.S. 969 (1974); *United Gas Pipe Line Co.* v. *Federal Power Commission,* 181 F.2d 796 (D.C. Cir.) cert. denied, 340 U.S. 827 (1950); and *Environmental Defense Fund, Inc.* v. *Hardin,* 428 F.2d 1093, 1098-99 (D.C. Cir. 1970).

Thus, the applicability of Section 1486 is of grave and vital import to all who seek review of decisions of any administrative agency. This number of rules, orders, regulations, and decisions spewing from the multitude of Federal agencies is awesome. It continues to grow. Unfortunately so does the confusion over who shall review them.

The Supreme Court must hear this cause and set forth in clear terms the path of review, not just for the petitioners herein and the public as it is affected by tomorrow's agency edicts.

C.

The brief of the plaintiffs-appellants in the Circuit Court of Appeals contended that the plaintiffs were denied due process of law as protected by the Fifth and Fourteenth Amendments to the United States Constitution by the rule-making procedures set forth in 14 CFR 11.27 *et seq.* Plaintiffs argued that absent the right to make a presentation at a formal hearing, there could be no constitutional safeguards to prevent the plaintiffs from being deprived of certain property rights. This argument was not addressed by the Circuit Court of Appeals at any point in their decision.

The important constitutional question of what is necessary to create a constitutionally permissable hearing

adjudicating property rights certainly cannot be lightly dismissed by simply ignoring the arguments. Again, the growing volumes of action taken by executive agencies mandate that there be clear and cogent guidelines against their abuse of power. It is inappropriate for the Circuit Court of Appeals to ignore this argument when properly raised in this case. Further, it is of general import that the Supreme Court decide whether or not these minimal constitutional requirements have been met in this case, not only so the plaintiffs can be guided but moreover so that the administrative agencies can be guided in their activities in the future without fear that they have failed to properly conduct proceedings so as to deny the rights of certain of the citizenry.

CONCLUSION

WHEREFORE, plaintiff-appellants, SIMA PRODUCTS CORPORATION, an Illinois corporation and IRWIN DIAMOND, pray that this court grant a Writ of Certiorari and review the decision of the Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-2500

SIMA PRODUCTS CORPORATION, an Illinois corporation, et al.,

Plaintiffs-Appellants,

v.

DR. JOHN MCLUCAS, Administrator, Federal Aviation Administration,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-81
Honorable ABRAHAM L. MAROVITZ, *Judge.*

ARGUED SEPTEMBER 24, 1979—DECIDED JANUARY 3, 1980

Before SWYGERT, PELL, and SPRECHER, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Plaintiffs-appellants Sima Products Corporation and its president, Irvin Diamond, brought this action in the district court, seeking declaratory relief against an amendment to a regulation, 14 C.F.R. § 121.538a(e) (1978), promulgated by the Federal Aviation Administration ("FAA") under certain sections of the Federal Aviation Administration Act, 49

U.S.C. §§ 1356, 1357 ("the Act") and 14 C.F.R. §§ 121.1(a), 121.538. Plaintiffs challenge the legality of the amendment on both procedural and substantive grounds. The district court dismissed the complaint for lack of subject matter jurisdiction, holding that jurisdiction to review the amendment issued by the FAA lies exclusively in the courts of appeals under section 1006(a) of the Federal Aviation Act, 49 U.S.C. § 1486. *Sima Products Corp.* v. *McLucas,* 460 F.Supp. 128, 134 (N.D. Ill. 1978). We affirm.

I

On March 5, 1975 the FAA promulgated an amendment to rule 121.538a which regulates the use of X-ray devices for the inspection of carry-on baggage and other items at airport security points. In relevant part, paragraph (e) of the amendment states that:

> No certificate holder [i.e., airport] may use an X-ray system to inspect carry-on baggage or items, unless a sign is posted in a conspicuous place which notifies passengers that such items are being inspected by an X-ray system and advises them to remove all X-ray and scientific film from their carry-on baggage and items before inspection. If the X-ray system exposes any carry-on baggage or item to more than one milliroentgen during the inspection, the certificate holder shall post a sign which advises passengers to remove film of all kinds from their carry-on baggage and items before inspection. If requested by a passenger, his photographic equipment and film packages shall be physically inspected without exposure to an X-ray system.

14 C.F.R. § 121.538a(e).[1] Pursuant to this rule, commercial airports have posted signs similar to those posted the American Airlines and Northwest Airlines security points in the O'Hare International Airport, Chicago, Illinois, which state:

> X-ray baggage inspection.
> Carry-on baggage is being inspected by X-ray.
> Inspection will not affect ordinary undeveloped film.
> Remove all X-ray and scientific film from luggage.
> Physical inspection may be requested.

Approximately nine months before the rule was promulgated, a notice of the proposed amendment and rule making appeared in the *Federal Register. See* 39 Fed. Reg. 22275 (June 21, 1974). In response to this notice, the FAA received numerous comments including ones from scientific and technical organizations, film manufacturers, and an association of photographic suppliers. Plaintiffs Diamond and Sima Products Corporation, which manufactures and distributes lead laminated containers that protect ordinary commercial film from the effects of X-ray machines, submitted written material to the FAA in opposition to the proposed amendment. They urged that the airport signs advise travelers that X-rays present a danger to all types of film. Along with the other responses, plaintiffs' comments were considered by the FAA and made part of the administrative record. *See* 14 C.F.R. § 11.-47(a). No evidentiary hearing was held prior to promulgating rule 121.538a.

On August 31, 1976 plaintiffs filed a petition with the FAA, requesting it to amend paragraph (e) so that

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[1] Paragraph (e) was amended on March 23, 1978 to expressly require that the sign "shall also advise passengenrs that they may request a physical inspection to be made of their photographic equipment and film packages without exposure to an X-ray system." 14 C.F.R. § 121.538a(e) (1979). The amendment is not at issue here.

passengers would be advised to remove all film from their carry-on baggage and items before inspection by an X-ray system.[2] *See* 14 C.F.R. § 11.25. Plaintiffs argued that signs like the ones posted in the O'Hare airport are misleading, and contrary to both scientific fact and personal experience of the plaintiffs. Therefore, plaintiffs maintained, the rule allowing airports to erect such signs is arbitrary, capricious, and unreasonable. To support the allegations, plaintiffs offered a variety of exhibits, including copies of articles in publications, personal correspondence, and a sign posted in the Tokyo, Japan airport by a non-U.S. air carrier.

Four months later, having failed to receive a response to their petition, plaintiffs filed this suit in district court against Dr. John McLucas, the FAA Administrator.[3] Asserting jurisdiction under 28 U.S.C. § 1346, they re-

[2] Specifically, plaintiffs requested that the first two sentences of paragraph (e) of regulation 121.538a be amended to read as follows:

> No certificate holder may use an X-ray system to inspect carry-on baggage or items, unless a sign is posted in a conspicuous place which notifies passengers that such items are being inspected by an X-ray system and advises them to remove all film from their carry-on baggage and items before inspection. The certificate holder shall post a sign which advises passengers that "This X-ray Machine is not Film Safe" or in the alternative that X-ray inspection may affect undeveloped film.

Letter of March 29, 1977 issued by John L. McLucas, FAA Administrator, denying petition to amend § 121.538a(e). Appendix to brief of appellee at p. 1a.

[3] In a letter issued on March 29, 1977, the petition to amend section 121.538a was denied. The FAA has provided this court with a copy of the Denial of Petition letter. Apparently, the letter was not part of the record in the district court. *See Sima Products Corp.* v. *McLucas, supra*, 460 F.Supp. at 130, n.1.

quested that the district court declare rule 121.538a void as arbitrary and unreasonable and order the FAA to promulgate an amendment to the rule notifying air travelers that X-ray devices are not film safe. The suit was dismissed for lack of jurisdiction and this appeal ensued.

II

At the outset, plaintiffs concede that the FAA fully complied with the notice procedures outlined in section 553 of the Administrative Procedure Act. 5 U.S.C. § 553, and that, in response to the notice of the proposed amendment and rule making that appeared in the *Federal Register,* they submitted written correspondence. Nonetheless, they argue that they never received a "true hearing" on the merits of their position and for this reason they are entitled to a hearing in the district court. The FAA opposes this position by contending that the explicit statutory language of section 1486 mandates that a determination as to the unreasonableness or arbitrariness of the amendment may be made only by this court.

In granting the FAA's motion to dismiss for lack of subject matter jurisdiction, the district court relied on 49 U.S.C. § 1486. That statute provides in pertinent part that "orders" of the FAA "shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia" and that "the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of . . . ." 49 U.S.C. §§ 1486(a) and (d). For a variety of reasons plaintiffs contend that regulation 121.538a(e) is not an "order" within the meaning of the section. However, we are unpersuaded.

First, plaintiffs urge that a literal approach to interpreting section 1486 be adopted by this court. It is argued that the special review statute does not apply to the FAA's action because it is labelled a "regulation,"

rather than an "order." This attempt to skirt the exclusive language of section 1486 is meritless because the term "order" for purposes of this statute should be construed more expansively than plaintiffs suggest. By adopting a liberal construction of "order," FAA actions which are the prodduct of informal rulemaking, such as in this case, may be reviewed by courts of appeals, providing an adequate administrative record has been compiled by the agency. Both statutory and judicial authority support our interpretation of section 1486.

The term "order" is broadly defined in both the Federal Aviation Act, 49 U.S.C. § 1354(a)[4] and the Administrative Procedure Act, 5 U.S.C. § 551(6).[5] Moreover, the purposes of special review statutes—coherence and economy—are best served if courts of appeals exercise their exclusive jurisdiction over final agency actions. *See City of Rochester* v. *Bond,* 603 F.2d 927, 936 (D.C. Cir. 1979).

In reaching ourt decision, we note that the District of Columbia Circuit Court has construed "order" for purposes of special review statutes expansively, to permit direct review of regulations promulgated through inforcal notice-and-comment rulemaking, such as in this case. *See, e.g., City of Rochester* v. *Bond, supra; Investment Company Institute* v. *Board of Governors of Federal Reserve System,* 551 F.2d 1270 (D.C. Cir. 1977); *Deutsche*

[4] Section 1354(a) states:

> The Administrator is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this chapter, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this chapter.

[5] Section 551(6) defines "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form."

Lufthansa Aktiengesellschaft v. *C.A.B.,* 479 F.2d 912 (D.C. Cir. 1973). *But see PBW Stock Exchange, Inc.* v. *SEC,* 485 F.2d 718 (3d Cir. 1973), *cert. denied,* 416 U.S. 969 (1974).

Plaintiffs' second argument is that inasmuch as the X-ray device amendment was promulgated without the FAA conducting an evidentiary hearing, it cannot be an "order" within section 1486. Although at one time it was believed that regulations promulgated after informal rulemaking were not reviewable in the courts of appeals, *see United Gas Pipe Line Co.* v. *Federal Power Commission,* 181 F.2d 796 (D.C. Cir.), *cert. denied,* 340 U.S. 827 (1950), more recent decisions establish that the indicium of "orders" reviewable within the meaning of special review statutes is the adequacy of the agency record. In *Deutsche Lufthansa, supra,* 479 F.2d at 916, in which the identical review statute raised in this case was interpreted, the court stated: "It is the availability of a record for review and not the holding of a quasi judicial hearing which is now the jurisdictional touchstone." The approach, construing "order" to mean any agency action capable of review on the basis of the administrative record, was confirmed in *Investment Company Institute, supra.* There the District of Columbia Court explicitly rejected the notion that regulations promulgated after informal rulemaking were not reviewable, holding that "the general approach taken by *United Gas Pine Line* is no longer good law in this circuit." *Id.* at 1276. The court articulated the purposes served by construing "order" in this fashion:

> . . . if the administrative record forms the basis for review, requiring petitioners challenging regulations to go first to the district court results in unnecessary delay and expense . . . and undesirable bifurcation of the reviewing function between the district courts and the courts of appeals . . . .

Id., 551 F.2d at 1276.

Plaintiffs further contend that the FAA's action is not an "order" for purposes of section 1486 because the facts adduced at the administrative level are in dispute. According to them, these questions of fact should be decided in the district court. This argument misses the point: a factual hearing before the district court judge is not necessary if judicial review is based on the agency record. *See Investment Company Institute, supra,* 551 F.2 dat 1276, citing Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum,* 75 Colum.L.Rev. 1 (1975); Verkuil, *Judicial Review of Informal Rulemaking,* 60 Va.L.Rev. 185 (1974). Moreover, where fact-finding within the competence of the agency is required, section 1486(a) permits the case to be remanded to the agency for further factual development if the administrative record is inadequate for review. Under such circumstances it makes no difference whether the reviewing court is a court of appeals or a district court, and "there seems to be no reason to inject another tribunal into the process." *Environmental Defense Fund, Inc.* v. *Hardin,* 428 F.2d 1093, 1098-99 (D.C. Cir. 1970).

Plaintiffs' final argument in its attempt to escape from the applicability of section 1486 is that they, unlike the certificate holders (e.g., airports), were not directly affected by the promulgation of rule 121.538a and, thereby, they are in a too peripheral position to be subject to the statutory review section. A similar argument was raised and summarily rejected in *City of Rochester* v. *Bond, supra,* a case which construed the special review statute at issue here. The plaintiffs there, challenging a FAA decision that a certain radio antenna tower was not a hazard to air navigation, argued that the decision was reviewable in the district court because the plaintiffs were not parties to the proceeding from which the order at issue arose. Such a distinction, the court said, was immaterial: "Statutory review is, or at least if timely sought would have been, an adequate means of reviewing appellants' allegations." *Id.* at 936.

III

In following the standard established by *Deutsche Lufthansa* and its progeny, we address the question of whether the administrative record compiled by the FAA in the course of its proceedings is adequate for review by a court of appeals.[6] If the FAA's record were inadequate to permit review directly in the court of appeals, we would be inclined to find that the action, although final, is not an "order" within the meaning of section 1486(a). See *Deutsche Lufthansa, supra.* However, we are not presented with that situation here. As plaintiffs concede, the FAA, in promulgating rule 121.538a(e), complied with the statutory rulemaking procedures prescribed in 5 U.S.C. 553(c) and 14 C.F.R. § 11(B). No evidentiary hearing is required under these procedures. *Id.* Despite compliance with the letter of the law by the FAA, plaintiffs contend that the record compiled at the administrative level is sparse and incomplete. To support their position, they point to the record developed in the district court prior to the filing of the FAA's motion to dismiss, which contains evidence not adduced at the agency level. Such evidence includes answers to interrogatories by experts and representatives of various manufacturers which plaintiffs claim support their position.

We think the record that was made is a sufficient basis on which to conduct appellate review of the rule. We reach this determination by looking at the nature of

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[6] It is not suggested that the FAA's regulation is unripe. The district court held that rule 121.538a(e) meets the finality criteria, *see Puget Sound Traffic Ass'n* v. *C.A.B.,* 536 F.2d 437, 439 (D.C. Cir. 1976). We agree. The regulation imposes specific obligations on certificate holders who, as the FAA points out, are subject to civil penalties under section 901(a) of the Federal Aviation Act, as amended, 49 U.S.C. § 1471, if a violation of the regulation occurs.

the claim raised on appeal. Plaintiffs argue that the signs are misleading and, as such, rule 121.538a(e) allowing airports to permit the signs to be posted is arbitrary, capricous, and unreasonable. Examining the administrative record before us, we find that it includes the notice of the proposed amendment published in the *Federal Register*. The notice provided that comments should be submitted on the question of "[w]hether exposure to X-rays may harm photographic film . . . or other items which may be contained in carry-on baggage . . . and, if so, what measures should be taken to eliminate or reduce such possible harm other than or in addition to those set out in this proposal." 39 Fed. Reg. 22275, 22276. In addition to the plaintiffs, other parties submitted comments in opposition to the proposed amendment, which were made part of the agency record. The record also includes the promulgated rule and its published explanation. A record composed of such materials is adequate for reviewing the appellants' claim. *See Rodway* v. *United States Dept. of Agriculture,* 514 F.2d 809 (D.C. Cir. 1975).

Plaintiffs' primary objection to this court's exclusive jurisdiction is that they will be unable to present to a court of appeals the additional evidence which they gathered subsequent to the promulgation of the rule. There are certain remedies provided for in section 1486 which should allay their concern. The August 31, 1976 petition to amend rule 121.538a(e) and the attached exhibits can supplement the administrative record. *See Investment Company Institute, supra,* 551 F.2d at 1281-82. Additionally, section 1486(d) provides that if the administrative record is inadequate to determine the legality of the rule, the court of appeals can remand the case to the FAA for further fact finding proceedings.

In conclusion, we hold that plaintiff must assert their claims in the court of appeals. According to section 1486(a), petitions for review of agency action must be "filed within sixty days after the entry of such order, by

any person disclosing a substantial interest" in the action. The sixty-day limit is long past for the plaintiffs. We note that section 1486(a) empowers the court of appeals to permit late filing of petitions for review "upon a showing of reasonable grounds for failure to file the petition theretofore." The question of whether appellants have a legitimate excuse for selecting the wrong forum, however, is not before us at this time.

The decision of the district court dismissing plaintiffs' suit for lack of subject matter jurisdiction is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

SIMA PRODUCTS CORPORATION, an Illinois Corporation, et al.,

Plaintiffs,

v.

DR. JOHN McLUCAS, Administrator, FEDERAL AVIATION ADMINISTRATION,

Defendants.

No. 77 C 81

MEMORANDUM OPINION

Motion to Dismiss

Plaintiffs, Sima Products Corporation ("Sima"); Irwin Diamond; Chicago Area Camera Club Association ("Camera Club") and Betty Obey bring this action against Dr. John Mc Lucas, Administrator of the Federal Aviation Administration ("FAA"), under 28 U.S.C. §§ 2201, 2202 seeking declaratory and injunctive relief. Plaintiffs allege, *inter alia,* that defendant promulgated an amendment to a FAA regulation, 14 C.F.R. §121. 538a(e) (1978), which unreasonably distinguishes X-ray and scientific film from ordinary photographic film, thereby causing signs to be posted at airport security points which deceptively state that "x-ray machines are film safe." Plaintifftiff's Complaint, ¶16. Plaintiffs seek a declaration that the amendment is void and an order that defendant promulgate another amendment which requires signs that warn of the damage that X-ray may cause to all film.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1346. Pending before the Court is defendant's motion to dismiss for want of subject matter jurisdiction. Rule 12(b) (1), F.R.Civ.P. For the reasons set forth below, defendant's motion is granted.

Plaintiffs allege that defendant has the authority under certain sections of the Federal Aviation Act, 49 U.S.C. §§1356, 1357 and 14 C.F.R. §§121.1(a), 121.538 to make and enforce air transportation security rules which apply to air carriers engaged in interstate commerce. On March 5, 1975, defendant promulgated an amendment to rule 121.538 which provides:

> a(e) No certificate holder may use an X-ray system to inspect carry-on baggage or items, unless a sign is posted in a conspicuous place which notifies passengers that such items are being inspected by an X-ray system and advises them to remove all X-ray and scientific film from from their carry-on baggage and items before inspection. If the X-ray system exposes any carry-on baggage or item to more than one milliroentgen during the inspection, the certificate holder shall post a sign which advises passengers to remove film of all kinds from their carry-on baggage and items before inspection. If requested by a passenger, his photographic equipment and film packages shall be physically inspected without exposure to an X-ray system. 14 C.F.R. §121. 538(e).

As a result of this rule, commercial airlines operating out of Chicago, Illinois, and other commercial airports in the United States have posted signs conforming to the language of the rule. For example, the signs at the American Airlines and Northwest Airlines security points read as follows:

> "X-ray baggage inspection
> Carry-on baggage is being inspected by x-ray Inspection will not affect ordinary undeveloped film
> Remove all x-ray and scientific film from luggage
> Physical inspection may be requested."
> Plaintiffs' Complaint, ¶9.

Plaintiffs allege that these signs are inaccurate, misleading and "contrary to scientific fact and personal experiences of the plaintiffs and other travelers, in that the X-

ray machines, even if they expose ordinary undeveloped film to one-half of one milliroentgen of radiation, can damage the film either through one dose of radiation or the cumulative effect of several inspections. Plaintiffs' Complaint, ¶11.

On August 31, 1976, pursuant to 14 C.F.R. §11.25, plaintiffs filed a petition with defendant requesting that defendant promulgate an amendment to rule 121. 538(e) in order to delete the language that plaintiffs consider to be misleading. Plaintiffs allege that defendant has not acted on the petition.[1] Plaintiffs bring this action claiming that rule 121. 538(e) is unreasonable, contrary to 49 U.S.C. §1357 and violative of public policy.

Sima manufactures and distributes "Filmshield" and 'Filmwrap", laminated lead foil products which protect film and other items from radiation. Sima alleges that the signs imply that its products are unnecessary. Camera Club is an umbrella organization of approximately seventy Chicago area camera clubs which contain over four thousand members. Plaintiff alleges that these members frequently carry photographic film when traveling on commercial airlines. Irwin Diamond, president of Sima, and Betty Obey, president of Camera Club, are frequent travelers on commercial aircraft in the United States. Pursuant to FAA regulations, airlines must require passengers to pass a security check upon entering the airport terminal. See 14 C.F.R. §121. 538. Rule 121. 538a authorizes the use of X-ray systems approved by the defendant.

Defendant contends that the Court of Appeals has exclusive jurisdiction of this matter pursuant to 49 U.S.C. §1486, the judicial review provision of the Federal Aviation Act, 49 U.S.C. §§1301, *et. seq.* (The "Act"). 49 U.S.C. §1486 provides in pertinent part:

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[1] The record does not indicate whether defendant has ever issued an official response to plaintiffs' petition as prescribed by 14 C.F.R. §11.51.

> (a) Any *order,* affirmative or negative, issued by the Board or Administrator under this chapter . . . shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia . . . . (emphasis supplied)
>
> (d) [T]he court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part. . . .

Plaintiffs argue that rule 121. 538(e) is not an order wtihin the purview of 49 U.S.C. §1486. Therefore, plaintiffs argue, that statute is not controlling and a district court can take jurisdiction over the subject matter of this case.

The narrow question before this Court is whether rule 121. 538(e) is an order within the ambit of 49 U.S.C. §1486. We note that the term order is not expressly defined by the Act, nor does the Act expressly delineate between orders and rules or regulations. Therefore, we look to judicial interpretation of 49 U.S.C. §1486 and similar statutory provisions for judicial review of agency orders.

Plaintiffs, relying on *United Gas Pipe Line Co.* v. *FPC,* 181 F.2d 796 (D.C.Cir. 1950), argue that a rule is not an "order" unless it was promulgated pursuant to an evidentiary hearing. In *United Gas,* the Court of Appeals for the District of Columbia held that the judicial review statute of the Natural Gas Act, 15 U.S.C. §717(r)(b), requierd a quasi-judicial proceeding, at which an evidentiary record was compiled, for a regulation to be an order within the meaning of the statute. The court reasoned that an appellate court would have "no intelligible basis for decision unless a subordinate tribunal has made a record fully encompassing the issues." *United Gas, supra* at 799. The requirement of a quasi-judicial hearing would necessarily preclude rule 121. 538(e) from review under 49 U.S.C. §1486.

The approach taken in *United Gas* has been significantly eroded by the same court in a line of more recent cases. See, *e.g., Deutsch Lufthansa Aktiengesellschaft* v. *CAB,* 479 F.2d 912 (D.C. Cir. 1973); *Mobil Oil Corpoartion* v. *FPC,* 469 F.2d 130 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 931 (1973); *City of Chicago* v. *FPC,* 458 F.2d 731 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972). Finally, in *Investment Co. Institute* v. *Board of Governor of Federal Reserve System,* 551 F.2d 1070, 1076 (D.C. Cir. 1977), the court expressly rejected their approach taken in *United Gas.*

In *Investment Co.,* the court determined that a rule which had been promulgated by the Federal Reserve Board according to informal rule-making procedudes was an "order" within the meaning of the judicial review statute of the Bank Holding Company Act, 12 U.S.C. §1848. "In our view, the purposes underlying [the review statute] will be served if 'order' is interpreted to mean any agency action capable of review on the basis of the administrative record." *Investment Co., supra* at 1278. *But see contra PBW Stock Exchange, Inc.* v. *SEC,* 485 F.2d 718 (3d Cir. 1973), *cert. denied,* 416 U.S. 969 (1974). The court reiterated its earlier observation in *Deutsch Lufthansa Aktiengesellschaft* v. *CAB, supra* at 916, that "'[i]t is the availability of a record hearing which is now the touchstone.'" *Investment Co., supra,* at 1277.

We adopt the interpretation given to "order" in *Investment Co.* Therefore, this Court must consider whether the administrative record in the instant case is adequate for review of rule 121. 538(a) under 49 U.S.C. §1486.

Plaintiffs challenge the adequacy of the administrative record on the ground that "no tribunal has ever produced a record encompassing issues raised by plaintiffs." Response to Federal Defendant's Motion to Dismiss, p. 4. We disagree. The record shows that defendant followed the statutory and regulatory rule making procedures set out in 5 U.S.C. §553 and 14 C.F.R. §11(B).

These procedures do not require an evidentiary hearing. *Id.* An Administrative record, Federal Aviation Administration, Reg. Doc. No. 13841, was compiled by defendant during the making of rule 121. 538(e) pursuant to 14 C.F.R. §§11.23, 11.29, 11.31. From our review of the administrative record, it appears that plaintiff Sima, by plaintiff Diamond, participated in the informal rulemaking by submitting comments[2] in response to notice

[2] Letter of August 16, 1974 from Sima to FAA provides in part:

> "Since the installation of X-ray devices at airports, our organization has responded to a need for the
> our organization has responded to a need for the protection of photographic film.
> We feel that signs at airports should advise air travelers that X-rays present a potential hazard to photographic film and that they may remove same from hand-luggage and carry their film through the magnetometer. In this way, inspection is expedited, film is protected and baggage examination is not compromised.
> Signs at airports warning of danger to *all film* is important for the following reasons:
>
> (1) X-ray units emitting dosages below 1 milliroentgen does not take the cumulative effect of X-rays into consideration since travelers may pass many inspection points during the course of an extended trip, subjecting their film to X-ray dosages beyond safe limits.
> (2) X-ray units that are 'safe' for film at time of inspection (1 milliroentgen emission) may not necessarily operate at the same efficiency one week later. Over-caution in this instance serves to protect the consumer and presents no loss of efficiency to the inspection process.
> (3) Airlines who have resisted any mention of the negative aspects of X-ray inspection demonstrate an over-sensitivity to public reaction.

of the proposed amendment and rule making that was published in the *Federal Register,* 39 Fed. Reg. 22275 (June 21, 1974). Sima's objections to the proposed amendment were incorporated into the administrative record for defendant's consideration in promulgating the amendment. See 14 C.F.R. §11.47(a), "All timely comments are considered before final action on the rule-making proposal is taken"; 40 Fed. Reg. 10173 (March 5, 1975), "Due consideration has been given to all comments presented in response to the notice." Furthermore, other parties made similar objections to the proposed amendment, a(e), ot rule 121. 538. These comments[3] were apparently considered by defendant and made part of the administrative record.

Courts have acknowledged that this type of record is sufficient for determining the validity of an agency's action. *See Rodway* v. *United States Department of Agriculture,* 514 F.2d 809, 817 (D.C. Cir. 1975); *National Nutritional Foods Association* v. *Mathews,* 418 F. Supp. 394, 397 (S.D.N.Y. 1976), *rev'd on other grounds,* 557 F.2d 325 (2d Cir. 1977). "The whole record [for the purpose of judicial review] in an informal rule-making case is comprised of comments received, hearings held, if any, and

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[2] (Continued)

X-ray inspection has been responsible for transporting millions of travelers safely without the hazard of hi-jackings. This is to the credit of the industry, and this exemplary record can be continued with the photographic film."

[3] *See, e.g.,* Comments submitted by the following:
Petersen's Photographic Magazine (enclosed material), Aug. 17, 1974
National Association of Photographic Manufacturers, Inc., Aug. 16, 1974
Aviation Action Consumer Project, Aug. 20, 1974
Guild Photographers (enclosed material), July 8, 1974
Eastman Kodak, Aug. 16, 1974
State Film Productions, Aug. 14, 1974

the basis and purpose statement." *Rodway, supra,* at 817. The record compiled during the promulgation of rule 121. 538(e) appears to satisfy these requirements. It includes the official notice of rule-making published by the FAA in the *Federal Register,* comments received in response to the notice, the promulgated rule and its published explanation. Moreover, plaintiffs' petition of August 31, 1976 to amend rule 121. 538(e), along with the appended exhibits, can supplement the administrative record for judicial review under 49 U.S.C. §1486. *See Investment Co., supra* at 1281-82. Even were the Court of Appeals to find that the record is inadequate to determine the rule's validity, that court can remand the cause to the defendant for further proceedings. 49 U.S.C. §1486(d) provides in part, "the court shall have exculsive jurisdiction . . . and if need be, to order further proceedings by . . . [the] Administrator."

For the above stated reasons, we conclude that the administrative record in the instant case is an adequate record for direct review of rule 121. 538(e) by the Court of Appeals.

Yet another requirement for an order to be reviewable under 49 U.S.C. §1486 is that it be a final agency action. *Mc Manus* v. *CAB,* 286 F.2d 414, 417 (2d Cir.) *cert. denied,* 366 U.S. 928 (1961). A final agency action has been defined as one which "imposes obligations, denies rights, or fixes some legal relationship." *Puget Sound* v. *CAB,* 536 F.2d 437, 439 (D.C. Cir. 1976); *Pan American Grace Airways, Inc.* v. *CAB,* 342 F.2d 905 (D.C. Cir.), *cert. denied,* 380 U.S. 934 (1964). Rule 121. 538(e) meets these finality criteria. The language of the rule imposes obligations on both certified air carriers and their passengers. See 14 C.F.R. §121. 538(e).

Because rule 121. 538(e) is a final order within the meaning of 49 U.S.C. §1486, the Court of Appeals has exclusive jurisdiction to review it. 49 U.S.C. §1486(d), *supra. Oling* v. *Air Line Pilots Association,* 346 F.2d 270 (7th Cir.), *cert. denied,* 382 U.S. 926 (1965); *Holman*

v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N.D. Ga. 1962). *See also Investment Co., supra* at 1278-80.

We now consider plaintiffs' rather vague challenge to the sufficiency of the FAA's notice procedures under 5 U.S.C. §553(b) and 14 C.F.R. §11.29. It is well established that an agency's notice to the public of proposed rule-making is sufficient under 5 U.S.C. §553(b) where the substance of the proposed rule is announced, *National Industrial Traffic League* v. *United States,* 396 F. Supp. 456, 460 (D.C.D.C. 1975) and where interpreted parties are given a reasonable opportunity to participate,*Forester* v. *Consumer Products Safety Commission,* 559 F.2d 774, 787 (D.C. Cir. 1977). Furthermore, as the court in *Forester* v. *Consumer Products Safety Commission, supra,* concluded, 5 U.S.C. §533(b) "provides at least as much protection as does the Fifth Amendment." *Id.* at 787. Defendant's notice of rule-making that was published in the *Federal Register* meets the reasonableness standard of *Mullance* v. *Central Hanover Bank,* 339 U.S. 306 (1950). In a situation such as this, where all parties interested in the promulgation of a rule may not be known to defendant, it is simply not reasonable or practical to require defendant to give more adequate notice.

The aforementioned requirements are satistified by the notice issued in the instant case. Defendant published notice of proposed rule-making in the *Federal Register.* 39 Fed. Reg. 22275 (June 21, 1974). Proposed amendmenta(e) to rule 121. 538 was set out and interested parties were invited to participate "in the making of the proposed rule by submitting . . . written data, views, or arguments" concerning the proposal. *Id.* Furthermore, comments were solicited on the issue of "[w]hether exposure to X-rays may harm photographic film . . . or other items which may be contained in carryon baggage . . . and, if so, what measures should be taken to eliminate or reduce such possible harm other than or in addition to those set out in this proposal." *Id.* at 22276. In any event, it appears that plaintiffs Sima and Diamond had

some notice of the rule-making proceedings by the incorporation of Sima's letter of August 16, 1974, into the administrative record. *Supra.*

Plaintiffs' unsupported constitutional challenge to the cule-making procedures prescribed by 5 U.S.C. §553(c) and 14 C.F.R. §§11.27(a), 11.31, 11.33, 11.37 is also without merit. Plaintiffs contend that the procedures which preclude the necessity of an evidentiary hearing "deny the most basic tenents of due process." Response To Federal Defendant's Motion to Dismiss, p. 6. We disagree. The constitutional sufficiency of informal administrative procedures has long been recognized. *See Bowles* v. *Willingham,* 321 U.S. 503, 519-20 (1944); *Bi-Metallic Investment Co.* v. *State Board of Equalization of Colorado,* 239, 239 U.S. 441, 445 (1915); *California Citizens Band Association* v. *United States,* 375 F.2d 43, 50 (9th Cir.), *cert. denied,* 389 U.S. 844 (1967). Mr. Justice Holmes, speaking for the Court in *Bi-Metallic Investitment Co.* v. *State Board of Equalization of Colorado, supra,* reasoned:

> "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole." 239 U.S. 441 at 445.

Although we hold that *this* Court does not have subject matter jurisdiction over plaintiffs' action, plaintiffs are not necessarily without a forum. We realize that 49 U.S.C. §1486(a) requires that a petition for review in the Court of Appeals should be filed within sixty days after entry of the order by the Administrator. We also realize that plaintiffs' opportunity to file a petition by right no longer exists. However, 49 U.S.C. §1486(a) provides that the Court of Appeals may grant leave to file an untimely petition, provided that plaintiffs can show

reasonablegrounds for the delay. That burden now rests on plaintiffs should they decide to seek review of the rule pursuant to 49 U.S.C. §1486.

For the reasons set forth above, we hold that rule 121. 538a(e) is a final order within the ambit of 49 U.S.C. §1486 in that the administrative record is sufficient for review of rule 121. 538a(e) by the Court of Appeals. Therefore, this Court lacks subject matter jurisdiction of plaintiffs' cause. Accordingly, defendant's motion to dismiss for want of subject matter jurisdiction is granted.

Enter:

/s/ Abraham Lincoln Marovitz
Judge

Dated: November 9, 1978